BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 Direct Broadcast Satellite Public Service Obligations	MM Docket No. 93-25

To: The Commission

REPLY COMMENTS OF RESEARCH TV

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SUMMARY

If DBS proposals in this proceeding were adopted, the net result would be that DBS operators would continue to carry only the same widely-distributed, established programming services that already are carried by DBS and cable operators. To avoid this result, the Commission should not adopt DBS proposals to exclude from the channel capacity set-aside calculation a significant amount of actual channel capacity; reserve the smallest possible percentage of that remaining capacity; and establish a sliding scale set-aside formula -- proposals that would, taken together, result in a set-aside of even less than the minimum allowable four percent. DBS operators should reserve seven percent of channel capacity in order to ensure that a meaningful amount of Section 25 programming is made available to the public and comport with Congress' intent that larger DBS systems be subject to the maximum set-aside requirement established in the statute.

DBS operators also should not be permitted to impose any access fee for Section 25 programming -- at least where the programmer is a nonprofit entity or receives federal funding in support of its programming. Access fees would impact most detrimentally upon precisely those programmers whose programming is not presently accessible to the public, and which Section 25 was therefore designed to promote.

Likewise, DBS operators should not be empowered to determine what programming should be provided to the public

under Section 25. Instead, in order to ensure that DBS systems carry a diverse body of noncommercial educational programming, the Commission should require that discrete blocks of reserved channel capacity be set aside for each of the three categories of national educational programming suppliers identified in Section 25. The block of channels reserved solely for educational institutions should in turn be subdivided to ensure a separate reservation of channel capacity for each of the three major components of the formal educational community in this country: K-12 entities, research universities and other post-secondary educational institutions.

The Commission should define the term "educational institutions" as used in Section 25 to include only educational institutions that are accredited, and entities comprised exclusively of, or controlled exclusively by, accredited educational institutions. The Commission should not adopt proposals advanced in this proceeding to include other entities, including those identified in the Commission's ITFS rules.

Finally, the Commission should permit accredited educational institutions themselves to administer the Section 25 channels reserved for them, rather than authorize a single unwieldy organization to administer all Section 25 channels for a large number of different types of programmers. This would be similar to cable television procedures, where public access PEG channels frequently are administered by a public access group, while educational PEG channels are separately administered by representatives of the educational community.

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Research TV hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

Research TV is a collaboration of major research universities providing public access to research information through video technologies. Research TV filed initial comments in this proceeding and made the following proposals to implement the set-aside requirements of Section 25: The Commission should (i) require each DBS operator to set aside a block of channels which are equal to seven percent of its total channel capacity and which are received by at least 75 percent of the system's subscribers; (ii) permit noncommercial educational programmers -- at least those that are nonprofit entities and

those that receive Federal funding in support of their programming -- to gain access to such capacity without payment of any fee to DBS operators; (iii) require the reservation of separate, discrete blocks of channel capacity for each of the three categories of noncommercial educational programmers identified in Section 25; (iv) guarantee one-third of reserved channel capacity for access by educational institutions; (v) define educational institutions to include only accredited educational institutions and entities comprised exclusively of, or controlled exclusively by, accredited educational institutions; (vi) ensure that three discrete categories of accredited educational institutions (K-12 institutions, research universities and other post-secondary educational institutions) have equal access to the reserved channels set aside for accredited educational institutions; and (vii) appoint an accredited educational institutions committee to establish reasonable procedures for the allocation of Section 25 channels among accredited educational institutions where demand exceeds the number of available Section 25 channels.

The purpose of Section 25 is to ensure that the public has access to a meaningful amount of diverse noncommercial educational programming. Research TV's proposals are intended to further that goal by affording accredited educational institutions and other noncommercial programmers the right to program the maximum number of DBS channels permitted by Section 25; by minimizing the fees that may effectively nullify

that right; and, through the reservation of discrete blocks of capacity for several distinct types of programmers, ensuring that the public gain access to a varied and diverse body of noncommercial educational programming.

In contrast, the DBS industry has proposed regulations that would undermine rather than further the fundamental purposes of Section 25. They would make a minimal number of channels available by excluding from the set-aside calculation a significant amount of actual available capacity, and then reserving the smallest possible percentage (four percent) of that remaining capacity. Even at that, they propose a sliding scale formula, as well as a definition of "channel capacity", that would result in a set-aside of even less than the minimum allowable four percent. They would then make that capacity inaccessible to all but a handful of programmers by requiring programmers to pay access fees geared to unrealistic, excessive and prohibited costs. They have opposed any mechanism for ensuring that the Section 25 programming provided to the public be diverse, proposing instead that DBS operators have the sole authority to determine what programming qualifies as noncommercial programming and to select which noncommercial programming within that pool will be provided to the public.

The net effect of the DBS proposals would be nothing more than maintenance of the status quo and an effective nullification of Section 25. DBS operators would continue to offer only programming services they presently offer (generally

PBS, C-Span, The Learning Channel and The Discovery Channel), and would claim that provision of such services fully satisfies the requirements of Section 25.

There would have been no reason for Congress to have enacted Section 25 if the provision is implemented as proposed by DBS interests in this proceeding. The public already has access to the widely-viewed programming services DBS operators presently carry and would continue to carry in "satisfaction" of their Section 25 obligations; such programming is available not only on DBS but also on cable and, in the case of PBS programming, over-the-air broadcasting. Section 25 was adopted to ensure that the public has access to an additional assortment of quality noncommercial educational programming from other diverse sources, such as the programming created by the universities who comprise Research TV -- programming that brings important information to the American public but that currently can only reach the public it is intended to serve if it is distributed over DBS pursuant to Section 25. Adoption of the proposals advanced by DBS entities would enable DBS operators to avoid that objective altogether.

DISCUSSION

I. THE SET-ASIDE SHOULD BE SEVEN PERCENT OF TOTAL CHANNEL CAPACITY

DBS entities articulate a proposal for a set-aside formula of four percent of channel capacity. As discussed

below, a four percent reservation is clearly at odds with sound public policy and Congressional intent in enacting Section 25. Furthermore, the DBS proposal is actually for a set-aside of far less than four percent, in violation of Section 25.

A. The DBS Four Percent Proposal Is Inadequate

The four percent set-aside proposal is premised on the assertion that the DBS industry is in its "nascent" stages. (Comments of ASkyB at 13; SBCA at 5.) However, no DBS interest has even argued, much less demonstrated, that a larger set-aside would work a hardship on DBS, slow the growth or development of the industry or require elimination of program services that would otherwise be offered. In fact, as demonstrated by data cited by Research TV and other commenters, the DBS industry is extraordinarily successful and growing at an unprecedented pace. (See Comments of Research TV at 8-10.)

A four percent set-aside also ignores the fact that when it enacted Section 25, Congress explicitly contemplated that large systems should set aside a greater amount of channel capacity than small systems. See H.R. Rep. No. 102-862, at 100 (1992). By the standards existing in 1992, when Section 25 was enacted, every DBS system operating today is very large; DBS operators should now be subject to the maximum reservation requirement mandated by Congress.

At least one DBS entity has argued that four percent is an appropriate set-aside because there may be an insufficient amount of noncommercial educational programming of a national

scope to fill more than four percent of DBS channel capacity. (Comments of SBCA at 5.) Research TV agrees that Section 25 reserved channels are to be used solely for programming of a national scope. However, there is no factual basis for the assertion that there is an insufficient quantity of such programming to fill more than four percent of DBS channel capacity. Moreover, even if the assertion were true, Section 25 explicitly permits DBS entities to utilize unused reserved capacity should such capacity exist (47 U.S.C. § 335(b)(2).) Consequently, reservation of more than four percent in the event of insufficient noncommercial educational programming would not create a hardship for DBS operators. In contrast, a larger reservation requirement would ensure that reserved capacity exists for the provision of noncommercial educational programming if and when such additional programming comes into existence.

B. The DBS Proposal Is Actually For Less Than Four Percent

Most DBS entities propose a sliding scale/step method for calculating channel set-aside requirements which in fact would permit DBS operators to set aside less than four percent of their channel capacity for Section 25 programming. (Comments of ASkyB at 14; SBCA at 11; Primestar Partners at 15-16.) For example, under the SBCA proposal, DBS systems with 99 channels would set aside only three channels, for three percent of the total. Systems with 43 channels would set aside only one

channel, for 2.3 percent of the total. (Comments of SBCA at 12.)

The SBCA proposal also would impose a ceiling of seven set-aside channels for any system of 175 channels or more -- the apparent size of most DBS systems in operation today. For a 500-channel system, SBCA's proposed cap of seven channels would result in a set-aside of only 1.4 percent. Even systems operating with 200 channels would set aside only 3.5 percent of their channel capacity under SBCA's formulation -- less than required by law and only one-half of the full seven percent set-aside contemplated by Congress for larger systems.

The DBS comments also urge the Commission to restrict significantly the total channel capacity against which the reservation requirement should be measured. They propose that only channels that a DBS operator has chosen to use for "non-duplicative full-motion video program services" (Comments of Primestar Partners at 14-15) or "video channels offered to the public" (Comments of SBCA at 9; USSB at 7) are to be considered in calculating the set-aside reservation under Section 25.

This proposal is at odds with the plain language of Section 25, which requires reservation of a percentage of a DBS operator's "channel capacity". Had Congress intended that the set-aside calculation be made solely against that portion of channel capacity that DBS operators have chosen to utilize for motion video programming, the statute would have so stated. There is no basis for excluding from the Section 25 reservation

calculation a significant portion of a DBS operator's channel capacity in the manner proposed by DBS interests other than to accomplish the objective of improperly minimizing the obligations of DBS operators under Section 25.

The Commission also should not permit DBS operators to refuse to set aside portions of channels if a portion of a channel would be necessary in order to accomplish reservation of the appropriate full percentage of channel capacity. If DBS operators are concerned about setting aside partial channels, they have the option of rounding their set-aside reservation up to the next full channel in order to comply with the requirements of Section 25. In no event, however, should DBS entities be permitted to satisfy their Section 25 obligations by providing isolated slots of time intermixed with non-Section 25 programming. As Research TV and others urged in their Initial Comments, viewers must be assured of a readily identifiable, solid block of full channels for Section 25 noncommercial educational programming in order to have meaningful access to such programming.[1]

DBS entities also argue that no more than fifty percent of a DBS operator's set-aside capacity should be required to be

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[1] Research TV agrees with the thrust of the AAPTS/PBS proposal that Section 25 programmers should not be relegated to the "graveyard period" of between midnight and 6:00 a.m. Those programmers who do not wish to program an entire channel should be assured at least of access to channel dayparts that are readily accessible to viewers. However, DBS operators must reserve full channels in order to accommodate those programmers with adequate programming to fill whole channels.

placed on the "basic" or lowest-priced tier of service. (Comments of Primestar Partners at 17.) This proposal is contrary to the Congressional purpose underlying Section 25 to promote public access to noncommercial educational programming.

Furthermore, it is not known whether DBS service will in the future be configured in such a way that higher-priced tiers of service will necessarily include all of the programming available on the lowest-priced tier of service. If the Commission requires that a certain percent of Section 25 programming be available on the lowest-priced tier of service, it has no way of knowing what percentage of subscribers such programming might reach in the future. A formulation that more effectively advances the purposes of Section 25 would provide that a specified percentage of a DBS system's subscribers must have access to all Section 25 programming available on that system. Research TV's proposal that 75 percent of a DBS operator's subscribers must have access to Section 25 programming is a fair compromise between ensuring that a majority of a DBS system's subscribers have access to Section 25 programming while providing the DBS operator some flexibility in configuring its programming lineup.

Finally, DBS entities propose that they should be afforded anywhere between 180 days and one year before having to adjust their set-asides to account for increases in channel capacity. (Comments of ASkyB at 14; Primestar Partners at 15.) There is no justification for such a delay. DBS operators will

plan for and take into account the impact on their Section 25 responsibilities at such time as they modify their channel capacity; there is no reason to permit a lengthy time period in which to comply with the obligations of DBS operators under the statute.[2]

II. DBS OPERATORS SHOULD NOT BE PERMITTED TO CHARGE ACCESS FEES

Section 25 permits the FCC to establish DBS access fees for Section 25 programming of anywhere from zero to 50 percent of a DBS operator's direct costs in making reserved channel capacity available for noncommercial programming. (47 U.S.C. §§ 335(b)(3) and (4).) Research TV's Initial Comments explained that the underlying objectives of Section 25 would best be advanced if programming entities are permitted to devote their available resources to the development of quality noncommercial educational programming for the public rather than divert

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[2] Likewise, DBS operators seek up to a two year transition period before their Section 25 responsibilities take effect, as well as grandfathering of existing programming agreements. (Comments of USSB at 8; SBCA at 13.) DBS operators have not established the need for such a lengthy transition period. They have been on notice of the requirements of Section 25 since 1992. Similarly, there is no need to "grandfather" programming contracts to enable DBS operators to meet their obligations under Section 25. DBS operators have conceded in this proceeding that there are a number of channels at their disposal (channel guides, duplicative video channels, barker channels and the like) presumably not subject to contractual restrictions that DBS operators could use for transmission of Section 25 programming should other channels be occupied by programming subject to contract.

precious resources to wealthy DBS operators in payment of access fees under Section 25. Research TV, as well as several other commenters in this proceeding, accordingly proposed that DBS operators not be permitted to impose any access fees for noncommercial educational programming provided to DBS operators at no charge -- at least in cases where the programmers are nonprofit entities or receive Federal funding in support of their programming.

DBS interests have advanced a series of access fee proposals that would have the net effect of depriving the public of access to the noncommercial programming of all but the most successful programming entities -- precisely that programming which is already carried by DBS and cable systems across the country and to which the public already has widespread access.

For example, DBS entities argue that DBS operators should be free to define and identify the "direct costs" incurred for transmission of Section 25 programming for purposes of calculating access fees. (Comments of SBCA at 14; Primestar Partners at 6.) At the same time, they argue that "direct costs" for purposes of Section 25 should include costs attributable to launching and distributing DBS services generally, including financing and tax costs; those associated with constructing, launching, controlling, tracking and maintaining DBS satellites; and auction payments. (Comments of ASkyB at 22; Primestar Partners at 25-26.) Other DBS commenters propose that all "platform provider capital costs" should be

included, as well as research and development costs. (Comments of SBCA at 15.)

Inclusion of any of these costs in the calculation of "direct costs" is prohibited by Section 25. Congress clearly stated that, for purposes of Section 25, direct costs "include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite...." H.R. Rep. No. 102-628. at 125 (1992). (Emphasis added.) Section 25 also explicitly prohibits inclusion of overhead costs in the calculation of direct costs (47 U.S.C. § 335(b)(4)(C)(i)) -- costs such as those identified by DBS operators in this proceeding as associated with controlling, tracking and maintaining the satellite and for research and development.

The proposal by DBS interests to include such clearly prohibited costs in the calculation of Section 25 direct costs underscores the need for the Commission, rather than DBS operators, to define specifically the term "direct costs" for purposes of establishing Section 25 access fees. However, as proposed by Research TV, the better course is to preclude imposition of access fees altogether -- at least for nonprofit programmers and those receiving Federal funding in support of their programming. Even if the Commission properly defines "direct costs" under Section 25 as only those costs associated directly with uplink of noncommercial programming, it would be difficult for noncommercial educational programmers to assess

the validity and appropriateness of "direct costs" claimed by DBS operators for this new and technologically complex program delivery mechanism.

Moreover, imposition of an access fee would have a disproportionate impact on programming entities who do not presently have any meaningful distribution mechanism and whose programming Section 25 was therefore intended to support. Imposition of an access fee would pose relatively less hardship on those programmers already enjoying widespread distribution via DBS and cable. They typically have significant financial resources; DBS and cable operators generally compensate them for carriage; and DBS operators could refrain from imposing any access fees on those programmers they wish to continue carrying.

DBS entities have not demonstrated that they would be injured if they are not allowed to charge noncommercial programmers a fee for the quality programming they would receive free-of-charge from noncommercial programmers under Section 25. The FCC should not adopt a fee structure which simply perpetuates the status quo (carriage by DBS of a few widely-distributed, established services) to the detriment of the public's ability to access diverse noncommercial educational programming as contemplated by Section 25.

III. EDUCATIONAL INSTITUTIONS SHOULD BE DEFINED TO INCLUDE ONLY ACCREDITED EDUCATIONAL INSTITUTIONS

Section 25 articulates three specific categories of entities to be considered noncommercial programming entities -- educational institutions, noncommercial educational television stations and other public telecommunications entities. As an organization of research universities, Research TV is, of course, particularly concerned with the definition of the term "educational institutions", one of the three categories of noncommercial programming entities specified in Section 25.

Several commenters endorse the proposal that the term "educational institutions" be defined by reference to Section 74.932 of the FCC's Rules (47 C.F.R. § 74.932), governing the ITFS service. (See, e.g., Comments of ASkyB at 17-18.) Section 74.932 authorizes issuance of ITFS licenses to an "accredited institution, governmental organization engaged in the formal education of enrolled students, [and] a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations . . . ."

Research TV endorses the proposal that an educational institution must be accredited in order to qualify as a noncommercial programming entity under Section 25; Research TV would be opposed to any definition of the term "educational institutions" that does not include a requirement of

accreditation. (See Comments of Research TV at 18-19 for a discussion of the significance of accreditation within the formal educational community, and the necessity that the term "educational institutions" be defined under Section 25 by reference to their accreditation status.)

Research TV is opposed, however, to broadening the definition to include any entity that is not in fact an accredited educational institution or an entity comprised, or created through a collaboration and under the exclusive control, of an accredited educational institution or institutions. In specifically carving out a place for educational institutions as distinct from noncommercial television stations and public telecommunications entities, Congress recognized, in enacting Section 25, that formal educational institutions fulfill a distinct mission from other entities who may happen to have general educational purposes. "Nonprofit organizations that provide instructional television material" to educational institutions and certain governmental organizations, the ITFS definition that some commenters would import into the Section 25 rules, generally would qualify as "public telecommunications entities" under Section 25. There is no reason to include them as "educational institutions", or to otherwise track the language of the ITFS rules in establishing a definition of the term "educational institutions" under Section 25. The term is largely self-defining. Educational institutions should be defined simply to in fact include only accredited educational

institutions, and entities comprised of or created through a collaboration and under the exclusive control of such institutions.

IV. IN ORDER TO PROMOTE THE OBJECTIVES OF SECTION 25, THE RULES SHOULD ENSURE THAT THE PUBLIC HAS ACCESS TO PROGRAMMING PROVIDED BY SEVERAL DISCRETE TYPES OF NONCOMMERCIAL PROGRAMMING ENTITIES.

Commenters advance a number of proposals for determining which entities qualify as programming entities, what programming qualifies as noncommercial programming, and how reserved channel capacity should be allocated among programming entities. As with virtually all of the difficult questions implicated by Section 25, DBS entities essentially propose that they (with the advice of a DBS-controlled nonprofit entity established for such purpose) should have the sole authority to make all such determinations. (See, e.g., Comments of SBCA at 5-7.)

In order that Section 25 be used to promote rather than hinder public access to a diverse body of noncommercial programming, the FCC must adopt rules that ensure the public has access to programming supplied by a variety of noncommercial programming entities. Affording discretion to DBS operators to select which programming to carry under Section 25 virtually guarantees that DBS operators will simply continue to carry only those widely-distributed programming services that are already afforded carriage by DBS operators.

The Commission should instead ensure that discrete blocks of Section 25 channel capacity be reserved for each of the three categories of noncommercial programming entities specified in Section 25 -- noncommercial television licensees, public telecommunications entities and accredited educational institutions. Moreover, for the reasons described in Research TV's Initial Comments (at 21-22), the accredited educational institutions block of reserved channel capacity should be further subdivided to ensure equal blocks of capacity for accredited K-12 entities; accredited research universities; and other accredited post-secondary educational institutions.[3]

Research TV emphasizes that as the Commission confronts the question of what programming entities should be qualified under Section 25, it must take into account Congress' recognition of the need to promote and encourage nonprofit programming entities.[4] The Commission should not make any decisions relative to which programmers are entitled to provide Section 25 programming to the public (or take any other action in this proceeding) that would have the effect of encouraging DBS carriage of programming provided by commercial entities to

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[3] Research TV's focus of interest is, of course, the block of channels reserved for educational institutions. While no other commenters proposed reservation of discrete blocks of channel capacity for other categories or subcategories of noncommercial programming entities, Research TV supports the concept of such channel reservations.

[4] For example, Section 25 requires the Commission to take into account nonprofit status in establishing access fees. (47 U.S.C. §335(b)(4)(A).)

the exclusion of programming supplied by nonprofit programmers. It is, in fact, doubtful whether programming such as The Learning Channel and The Discovery Channel, produced by for-profit entities, should qualify as Section 25 programming at all. (See Comments of AAPTS/PBS at 13-15; DAETC at 11-13.)

Several programming interests propose that a nonprofit organization be established to "administer" the reserved channel capacity under Section 25. Research TV had proposed in its Initial Comments that the formal educational community should be permitted to establish an organization comprised of representatives of that community for the purpose of allocating channel capacity reserved for accredited educational institutions in cases where demand for such capacity exceeds supply. Research TV continues to believe that such a body could best anticipate the needs of its educational institutions constituents and establish productive and workable guidelines for allocation of scarce reserved channel capacity within the formal educational community. A workable model exists in the cable PEG access context, where a nonprofit public access body typically administers a cable system's public access channels, and a different nonprofit entity, comprised of representatives of the educational community, separately administers the cable system's educational access channels.

Research TV does not believe it would be workable for a single nonprofit entity to establish channel allocation and access guidelines for noncommercial educational programmers as a

whole. As described in Research TV's Initial Comments, such an entity would include too many distinct types of programming entities with different priorities and working styles. An organization comprised solely of accredited educational institutions representatives can best establish its own procedures for allocating channels within the block of channels reserved for such institutions in cases where demand for channels exceeds supply.

CONCLUSION

Research TV believes that the following proposals would most effectively and fairly promote the underlying objectives of Section 25. The Commission should:

- Require each DBS operator to set aside a block of channels which equal seven percent of its total channel capacity and which are received by at least 75 percent of the system's subscribers;
- Permit noncommercial educational programmers -- at least those that are nonprofit entities and those that receive Federal funding in support of their programming -- to gain access to such channels without payment of any fee to DBS operators;
- Require the reservation of separate, discrete blocks of channel capacity for each of the three categories

of noncommercial educational programmers identified in Section 25;

- Guarantee one-third of reserved channel capacity for access by educational institutions;
- Define educational institutions to include only accredited educational institutions and entities comprised exclusively of, or controlled exclusively by, accredited educational institutions;
- Ensure that three discrete categories of accredited educational institutions -- K-12 institutions, research universities and other post-secondary educational institutions -- have equal access to the reserved channels set aside for accredited educational institutions; and
- Appoint an accredited educational institutions committee to establish reasonable procedures for the allocation of Section 25 channels among accredited educational institutions where demand exceeds the number of available Section 25 channels.

Respectfully submitted,

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